UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

LION ELASTOMERS	)	
	)	
and	)	**Case Nos: 16-CA-190681**
	)	**16-CA-203509**
UNITED STEEL, PAPER AND FORESTRY,	)	**16-CA-225153**
RUBBER, MANUFACTURING, ENERGY,	)	
ALLIED INDUSTRIAL AND SERVICE	)	
WORKERS INTERNATIONAL UNION,	)	
LOCAL 228	)	

RESPONDENT'S POST-HEARING BRIEF

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ATTORNEYS FOR RESPONDENT

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I. INTRODUCTION

This case is about Joseph K. Colone ("Mr. Colone"), a former employee of Respondent, Lion Elastomers, LLC ("Respondent," the "Company," or "Lion Elastomers"), who was given every possible opportunity to improve his workplace conduct. On June 8, 2018, the Company gave him one last and final chance to do so by presenting him with a Last Chance Agreement. Mr. Colone chose not to sign the Last Chance Agreement, knowing full well the ramification for refusing to do so.

The Counsel for the General Counsel (the "General Counsel") alleges that Respondent's efforts to hold Mr. Colone accountable violated the National Labor Relations Act. In an attempt to prove his case, the General Counsel identified a single non-threatening statement, cherry-picked a handful of Mr. Colone's activities that are allegedly protected by the Act (ignoring numerous others), called three witnesses (only one of whom was a corroborating hourly witness), and offered thirteen exhibits (several of which had to be stricken from the record because they were incomplete).

Standing on this dearth of evidence, the General Counsel now asks for the evisceration of Respondent's Management Rights and for Mr. Colone to be totally immunized from the consequences of his own misconduct. The universe of the evidence presented at the Hearing does not warrant such a result. Indeed, the universe of the evidence compels a finding that Respondent did not violate the Act in any way, that Mr. Colone was not threatened, and that issuing the verbal warning and presenting the Last Chance Agreement to Mr. Colone were valid and lawful actions taken by the Company.

II. PROCEDURAL HISTORY

A. Case 16-CA-190681

On or about December 24, 2016, Mr. Colone filed Charge No. 16-CA-190681 on his own behalf, alleging that James Mosley, Respondent's Production Manager, threatened him with termination during a grievance meeting on October 24, 2016, and that Respondent was implementing more stringent work requirements against Mr. Colone in order to discourage union activities. Region 16 (the "Region") dismissed the portion of the charge alleging that Respondent implemented more stringent work requirements, and conditionally dismissed the threat allegation. The threat allegation is included in the Consolidated Complaint as an independent Section 8(a)(1) allegation and is not connected to the other complaint allegations that allege the discharge of Mr. Colone was unlawful.

B. Case 16-CA-203509

On or about July 31, 2017, Mr. Colone filed Charge No. 16-CA-203509 on his own behalf, challenging a verbal warning that Respondent issued to Mr. Colone on July 20, 2017, because of Mr. Colone's behavior in a monthly safety meeting. The Region deferred the charge for processing under the grievance and arbitration provision of the Collective Bargaining Agreement between Respondent and the Union.

C. Case 16-CA-211809

On or about December 8, 2017, Mr. Colone filed Charge No. 16-CA-211809 on his own behalf, alleging Respondent was harassing and discriminating against him by accusing him of making mistakes on the job and implementing stricter work requirements. The Region dismissed this charge in its entirety.[1]

[1] *See* R-29.

D. Case 16-CA-225153

On or about August 3, 2018, the Union filed Charge No. 16-CA-225153 on Mr. Colone's behalf, alleging that Mr. Colone's termination was the result of protected concerted activity.[2] The General Counsel issued a Complaint on this Charge on October 30, 2018.

E. The Consolidated Complaint and Respondent's Answer

On or about February 1, 2019, the Regional Director issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (the "Consolidated Complaint"), which joined Case 16-CA-225153 with Cases 16-CA-190681 and 16-CA-203509. Although Mr. Colone filed at least one other Charge (i.e., Case No. 16-CA-211809), the Region did not issue a complaint on it.

The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1) and (3) of the Act. Specifically, the Consolidated Complaint contends that:

- Mr. Mosley threatened Mr. Colone with termination during a Grievance meeting;
- Respondent disciplined Mr. Colone on July 31, 2017, because he raised questions during a safety meeting on behalf of himself and other employees and to discourage others from doing the same; and
- Respondent discharged Mr. Colone on June 8, 2018 because he:
    - Filed a Grievance on or about March 22, 2017;
    - Filed a Grievance on or about March 23, 2017;
    - Submitted a statement dated March 29, 2017 in support of the March 23, 2017 Grievance;[3]
    - Asked questions on behalf of himself and others at a safety meeting on July 12, 2017;

[2] This is the only Charge at issue that the Union decided to file on Mr. Colone's behalf.

[3] The General Counsel did not enter this statement into the record. Therefore, it cannot serve as evidence of protected activity.

- Filed a Grievance on or about November 15, 2017;
- Filed a Grievance on or about February 15, 2018;
- Filed a Grievance on or about March 23, 2018; and
- Submitted a statement in support of the March 23, 2018 grievance.

The Consolidated Complaint also alleges that Respondent violated the Act to discourage others from assisting the Union or engaging in concerted activities.

Respondent timely filed an Answer, which denied all allegations described in the Consolidated Complaint. Respondent specifically noted that the Consolidated Complaint actively mischaracterized the facts known to the Region in an attempt to create a prejudicial distortion of the actual facts.

F. The Hearing

The Hearing on the Consolidated Complaint took place before Administrative Law Judge Michael A. Rosas at the NLRB's Region 16 office in Houston, Texas, beginning on February 26, 2019 and concluding on February 27, 2019. Over the course of the Hearing, the General Counsel called three witnesses and entered thirteen exhibits (several of which were stricken). Respondent called six witnesses and entered approximately fifty exhibits. Neither the Union, which was represented by counsel, nor Mr. Colone, who did not have his own counsel, called any witnesses or submitted any evidence. At the conclusion of Respondent's case in chief, the General Counsel did not recall Mr. Colone or call a single rebuttal witness.

Respondent submits the issues for determination are as follows:

- Whether Mr. Mosley's alleged statement to Mr. Colone that Mr. Colone "was not going to make it" constitutes a threat that violates Section 8(a)(1) of the Act;
- Whether Respondent violated Sections 8(a)(1) and (3) of the Act when it issued Mr. Colone a verbal warning for his aggressive and confrontational behavior toward other employees and management during and following a safety meeting on July 12, 2017; and

- Whether Respondent violated Sections 8(a)(1) and (3) of the Act when it discharged Mr. Colone on June 8, 2018 after he refused to enter into a Last Chance Agreement, which Respondent presented to Mr. Colone as a result of his pattern and practice of falsifying information.

III. STATEMENT OF THE FACTS

A. Respondent operates a facility that manufactures rubber.

Respondent operates a 24/7 manufacturing facility in Port Neches, Texas, where it produces styrene butadiene rubber ("SBR") (the "Plant"). (Tr. 33, 457). Respondent's Plant has more than 200 employees, and 85-90 of the employees are members of the bargaining unit that is represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial, and Service Workers International Union, Local 228 (the "Union"). (Tr. 33; J-1).

Tony Wisenbaker is the Plant Manager – the highest authority in the Plant.[4] (Tr. 458-59). James Mosley is the Production Manager, oversees production functionality, and leads the Production Department.[5] (Tr. 366). Within the Production Department are additional supervisors who have responsibility over one of the four shifts (i.e., A, B, C, or D).[6] (Tr. 34-35). There are four Shift Superintendents: Luke Wolford, Robert Burnett, David Davenport, and Phillip Parks. (Tr. 35). Below the Shift Superintendents are four Shift Supervisors: Carl Tarver, Trey Priest, Russel Hinkle, Darrik Reynolds. (Tr. 35).

Brad Dean is the Safety and Security Manager. In this role, he is responsible for regulatory items from a safety and security standpoint, setting policies and procedures, investigating incidents, and conducting safety meetings. (Tr. 283, 383). Trudy Lord is the Human Resources

[4] Mr. Wisenbaker has served in this role since January 2, 2016. (Tr. 457).

[5] Mr. Mosley has been with the Plant since 1990. (Tr. 403). He began as an hourly electrician and was a member of the International Brotherhood of Electrical Workers. (Tr. 402).

[6] Each shift is twelve hours. (Tr. 34).

Director.[7] In her role, she handles employee relations and assists with labor relations, among other things. (Tr. 32-33). Paula Sharp is the Senior Director of Human Resources. (Tr. 57).

There are numerous job classifications within the bargaining unit, though all bargaining unit employees work in an operator or technician capacity. (Tr. 35). Respondent also employs non-Union hourly employees who hold maintenance, safety, environmental, and administrative positions. (Tr. 36).

B. The Collective Bargaining Agreement requires the Union and Respondent to work together, establishes Respondent's Management Rights, and outlines a grievance and arbitration procedure.

A Collective Bargaining Agreement ("Agreement") is in place between Respondent and the Union.[8] (J-1). The Agreement contains certain key provisions. First, Respondent and the Union acknowledge their common interest in the Company's success and express their intent to establish a harmonious relationship. (J-1, p. 2). Second, the Union recognizes Respondent's Management Rights, including, but not limited to, the exclusive judgment and discretion to discipline employees, discharge employees for cause, to set the standards for performance and productivity, use contractors to perform work, set the hours to be worked, and manage its facility, unless otherwise restricted by the express language of the Agreement. (J-1, p. 3).

Additionally, Respondent and the Union have implemented a Grievance and Arbitration process to further their mutual goal of maintaining a harmonious relationship. (J-1, pp. 4-6). The grievance process has three Steps.

[7] Ms. Lord has worked at the facility since 2006. (Tr. 32). At that time, International Specialty Productions ("ISP") operated the facility. Ashland, Inc. later purchased the plant from ISP, and Respondent purchased the plant from Ashland. (Tr. 32).

[8] The Agreement went into effect on July 1, 2016, and remains in effect until June 30, 2020. (J-1). Mr. Colone, among others, participated in negotiations for the current Agreement. (J-1, p. 17).

Step 1 requires the matter to be directed to the immediate supervisor by the end of the tenth working day following the occurrence of the event that gives rise to the grievance (J-1, p. 4). If the grievance is not adjusted to the satisfaction of the employee, it may be advanced to Step 2. (J-1, p. 4). Step 2 requires the grievance to be submitted to the Superintendent and Department Head, in writing, on forms provided by the Union, by the end of the tenth working day. (J-1, p. 4). If a settlement is not reached at Step 2, the grievance may be advanced to Step 3. (J-1, p. 4). The Human Resources Manager or other designated Company representative must meet with the steward and Union official and provide an answer in writing within ten working days after the date of the meeting. (J-1, pp. 4-5).

Time limits are "of the essence." (J-1, p. 5). Accordingly, the Company is not required to accept grievances that are not submitted within the time limits, and any grievance that fails to advance to the next Step within the designated time limitations shall be deemed settled on the basis of Respondent's last answer. (J-1, p. 5). If a grievance complies with the requirements of the three Steps, but remains unresolved, then the Union may take action to promote the grievance to arbitration. (J-1, p. 5).

C. Respondent prohibits certain inappropriate behaviors in the workplace.

Respondent is committed to the orderly, safe and efficient operations of the plant. (R-2). Accordingly, Respondent maintains Plant Rules that identify unsatisfactory safety and work performance behaviors.[9] (R-2). For instance, Respondent prohibits:

- Insubordination, abuse, or disrespect of [one's] supervisor(s) . . .;
- Disorderly conduct such as, but not limited to: engaging in or provoking a fight, horseplay, practical jokes;

[9] The General Counsel does not challenge the validity of Respondent's Plant Rules. Further, Mr. Colone testified that he knows of no Grievance challenging the Plant Rules. (Tr. 131).

- Behavior, threats or other indecent, inappropriate or obscene conduct that creates an intimidating, hostile, or offensive working environment;
- Falsifying, providing false information, or causing others to falsify a Company record . . . or other Company report; and
- Actions of an employee that bring into disrepute the image or reputation of LION ELASTOMERS or its employees.

(R-2, p. 4-5).

If an employee fails to avoid the behaviors described in the Plant Rules, or violates other Company policy or procedure, the employee may be subject to discipline under the Company's Discipline Policy. (R-3). Respondent utilizes a progressive discipline approach to encourage corrective action of employees who demonstrate behaviors that interfere with Respondent's or other employee's ability to achieve work standards, safe work practices, or proper workplace behavior. (R-3, p. 1). Respondent may also issue discipline where an employee fails to cooperate with Company investigation. (R-3, p. 1). Discipline may be administered as a Counseling Only, Verbal Warning, Written Warning, 2nd Written Warning, Last Chance Agreement/Suspension or Termination, but Respondent has reserved the right to issue discipline based on the factual circumstances of each situation; it is not bound by the progressive nature of the policy. (R-3, p. 2). These disciplinary actions are active for twelve months. (R-3, pp. 2-3). If an employee fails to bring about a positive change in his or her behavior or work performance, the employee will be terminated. (R-3, p. 3).

D. Mr. Colone has a lengthy history of Union service and activity.

Mr. Colone has worked at the Plant since 1977.[10] (Tr. 68). Although he has held several positions over the years, at the time of his separation from employment, Mr. Colone worked as a

[10] As noted above, other entities (e.g., ISP and Ashland) operated the Plant before Respondent acquired it.

Pigment/Soap Senior Tech Operator. (Tr. 69). In this role, he participated in the process of making latex for synthetic rubber. (Tr. 69). Mr. Colone worked the C-shift. (Tr. 70).

Mr. Colone has always been very active with the Union, at least during the years that Respondent has operated the Plant. (Tr. 36-37, 58-59, 72-74). Not only was Mr. Colone a vocal supporter of the Union, he also held at least two elected positions. At the Plant-level, Mr. Colone served as one of five Committeemen (i.e., member of the Joint Resolution Committee[11]). (Tr. 36-37, 57, 72-73, 75). In this role, he participated in contract negotiations, filed grievances, and engaged in other Union activity. (Tr. 73-75). Prior to the election in November 2017, Mr. Colone served alongside Joseph Wells, Duane Newman, Gerald Richard and Mark Vickers. (Tr. 75-76). After the election, Mr. Colone served alongside "Richard," Bobby Rodgers, Robert "Bob" Griggs, and Terrence Young. (Tr. 76).

Mr. Colone also served as a Steward when he was not on the Committee, and handled "front line grievance work." (Tr. 75). Additionally, Mr. Colone represented that he held a Union-level position – the position of Group Chairman, though Respondent did not have independent knowledge of that fact and is unsure of the role and duties of that position. (Tr. 37, 72).

While no statistical evidence was presented, Mr. Colone and Ms. Lord both testified that they believed Mr. Colone filed more grievances than any other member of the bargaining unit – at least since Ms. Lord began working for Respondent in 2006. (Tr. 76, 271-272). Respondent respected Mr. Colone's position with the Union, and understood that he had a job to do. (Tr. 46). While Mr. Colone's approach was often argumentative, if not aggressive, Ms. Lord expressly

[11] The Joint Resolution Committee meets on a monthly basis to discuss any concerns that the Union has. (Tr. 38). "The whole purpose is for [the Committeemen] to have an opportunity to have a voice, to come to [Respondent] on a regular basis, and we try to work through it together as a group." (Tr. 58).

denied a question posed by the General Counsel to Ms. Lord that the Company "was not too fond of the way Mr. Colone conducted Union business." (Tr. 49, 350).

To further illustrate Mr. Colone's significant Union activity during the relevant time period, Respondent identifies ten grievances that Mr. Colone submitted between August 2016 and his separation from employment in June 2018. Notably, the General Counsel does not contend that any of these Grievances motivated the Company's decision to discipline or discharge Mr. Colone.

- Grievance 13-2016: Mr. Colone submitted this Grievance on August 26, 2016, regarding the Pigment automation project. It was withdrawn and resubmitted. (R-5).

- Grievance 16-2016: Mr. Colone submitted this Grievance on October 15, 2016, regarding a Letter of Understanding related to the use of contract employees. This Grievance was denied at Step 3 on October 24, 2016. (R-8).

- Grievance 17-2016: Mr. Colone submitted this Grievance on October 12, 2016, regarding the Pigment automation project. This Grievance was denied at Step 3 on October 24, 2016. There is no evidence of any further action on this Grievance. (R-7).

- Grievance 1-2017: Mr. Colone submitted this Grievance on January 5, 2017, regarding a staffing issue in the Baler area. This Grievance was satisfactorily resolved at Step 1. Bobby Rodgers participated at this Step for the Union. (R-10).

- Grievance 2-2017: Mr. Colone submitted this Grievance on January 30, 2017, regarding Respondent's alleged failure to pay two employees the appropriate wage rate. This Grievance was satisfactorily resolved at Step 1. Joe Wells participated at this Step for the Union. (R-12).

- Grievance 5-2017: Mr. Colone submitted this Grievance on June 23, 2017, regarding an alleged threat by James Mosley toward Ronald Jones. This Grievance was denied at Step 1. There is no evidence of any further action on this Grievance.[12] (R-13).

[12] Mr. Jones did file an ULP Charge (Case No. 16-CA-201551) on this issue, however. (R-36). After a careful investigation, the Region dismissed the Charge because of insufficient evidence to establish a violation of the Act. (R-37).

- Grievance 7-2017: Mr. Colone submitted this Grievance on July 12, 2017, again alleging that Mr. Mosley threatened Mr. Jones.[13] This Grievance was denied at Step 1. There is no evidence of any further action on this Grievance. (R-14).

- Grievance 9-2017: Mr. Colone submitted this Grievance on July 27, 2017, regarding the verbal warning he received. This Grievance was denied at Step 3. (R-17).

- Grievance 12-2017: Mr. Colone submitted this Grievance on August 21, 2017, regarding alleged slanderous remarks toward him by an unidentified member of management. This Grievance was denied at Step 1. There is no evidence of any further action on this Grievance. (R-21).

- Grievance 5-2018: Mr. Colone submitted this Grievance on March 18, 2018, alleging that Ms. Lord is in violation of the Grievance process. This Grievance was denied at Step 1. There is no evidence of any further action on this Grievance. (R-26).

E. Mr. Mosley did not threaten Mr. Colone at the October 24, 2016 Meeting.

On October 24, 2016, a Step 3 meeting was held in the Administration Conference Room to discuss three unresolved Grievances.[14] (Tr. 79, 428, 465-466; R-46). Mr. Wisenbaker and Mr.

[13] In an effort to troubleshoot a problem, Mr. Mosley manually shut off a valve. (Tr. 436). Mr. Jones asked who shut off the valve on the radio, and Mr. Mosley advised that he had done so. Later, Mr. Jones told Aaron Valka, a Supervisor, that he refused to work with Mr. Mosley because he was unsafe. (Tr. 436). Mr. Mosley later approached Mr. Jones about his comment. (Tr. 437). During the conversation, Mr. Mosley tried to explain he did not do anything unsafe. (Tr. 437). When Mr. Mosley realized the conversation was going nowhere, he said "don't worry about it, this'll never happen again." (Tr. 437). Mr. Mosley explained he meant that he would not again take action like that without first communicating. (Tr. 437). Mr. Mosley also apologized for not communicating before he shut off the valve. (Tr. 438). For reasons unknown, Mr. Jones interpreted this as a threat to his job. (Tr. 437). Ms. Lord conducted an investigation, but could not substantiate the threat allegation. (Tr. 283). Mr. Jones did not give testimony at the Hearing.

[14] Mr. Colone testified that he was called to the meeting under false pretenses; namely, to discuss a donning and doffing issue that was the subject of a "case going on against the Company about not being paid properly." (Tr. 78-79) This is false. Not only does it defy logic that members of Respondent's management team would meet with rank-and-file Union members to discuss active litigation without the presence of any legal counsel, but Mr. Colone acknowledged in a written statement the he was called to a meeting to discuss grievances. (R-9). At the Hearing, Mr. Colone had no explanation for his failure to describe "accurately" the purpose of the meeting in his written statement. He could only state he simply failed to include it (an excuse he offered several times when confronted with his inconsistencies and obvious falsifications of his testimony.). (Tr. 175-176).

Mosley attended in Ms. Lord's place, as she was out of town, as the deadline to address the Grievances was fast approaching. (Tr. 465-466). Mr. Colone, Mr. Griggs and Mr. Vickers attended on behalf of the Union.[15] (Tr. 78). Mr. Griggs was designated as the scribe. (Tr. 78).

Mr. Wisenbaker started with Grievance 16-2016 because he believed it would be the easiest to resolve. (Tr. 467, 471; R-46). This Grievance, which Mr. Colone filed on behalf of "USW Workers" on October 15, 2016, alleged the Company was undermining the Union by temporarily using contract workers (i.e., lift truck drivers) to the detriment of bargaining unit employees. (R-8). Mr. Wisenbaker explained to Mr. Colone that he prepared a Letter of Understanding ("LOU") that memorialized the proposal to use contract lift truck drivers temporarily to alleviate complaints about the Union employees being forced to work overtime.[16] (Tr. 467-468, 471; R-4; R-46). On Friday, July 22, 2016, Mr. Wisenbaker consulted with Mr. Wells, the Chair of the Committee, and Mr. Johnston, who worked in the impacted area, about the proposal. (Tr. 469-470; R-46). Mr. Wells and Mr. Johnston were agreeable to the proposal, but wanted to discuss the proposal with the rest of the Committee over the weekend before they executed the LOU. (Tr. 469; R-46). On Monday, Mr. Wells returned an executed version of the LOU. (Tr. 470; R-46). Mr. Wisenbaker did not understand why there was still a Grievance over the issue since there was a signed LOU. (Tr. 471).

Mr. Colone acknowledged that the LOU existed (indeed, he referenced it in the Grievance), but rejected its validity because only two Committeemen, Mr. Wells and Mr. Johnston,

[15] Mr. Vickers was only in the meeting for ten to fifteen minutes because he had to make relief. (Tr. 356-357).

[16] Mr. Wisenbaker testified that the LOU indeed alleviated the overtime concerns at that point in time. (Tr. 472).

signed it – not all five. (Tr. 82). He denied that Mr. Wells discussed the substance of the LOU with him, despite Mr. Wells' representation to the contrary.[17] (R-46).

Mr. Wisenbaker asked Mr. Colone to drop the Grievance. (Tr. 82). Mr. Colone refused. According to Mr. Colone, things became heated at this point. (Tr. 82, 429-430). Mr. Colone told Mr. Wisenbaker and Mr. Mosley that he did not trust them or Joe Wells. (Tr. 471; R-11; R-46). He repeatedly interrupted Mr. Wisenbaker, Mr. Mosley and Mr. Griggs. (Tr. 431, 473-474; R-32, p. 2; R-46). In fact, because of the "dysfunctional" nature of the meeting, Mr. Griggs was unable to take notes – his sole purpose for attending the meeting.[18] (Tr. 473).

Mr. Wisenbaker then transitioned the discussion to Grievance 13-2016 and Grievance 17-2016, which Mr. Colone filed on August 26, 2016 and October 12, 2016, respectively. (R-5; R-7). These Grievances were related to a project that aimed to automate certain processes in Pigment. (R-5; R-7). Mr. Mosley was impassioned about this particular project, and had staked his reputation on the fact that he would not move it forward unless it could be fully automated to the point where two Pigment Operators could do the job. (Tr. 409, 454, 476). He was not going to cut any corners. (Tr. 413-414). Going into the meeting, Mr. Mosley was disappointed because he felt like Mr. Colone was not honoring his promise – vis-à-vis the Agreement – to work toward a harmonious relationship for the mutual benefit of the Union and the Company. (Tr. 452). Mr. Mosley had made numerous efforts to work with Mr. Colone, the other operators, and the Union.[19]

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[17] Mr. Wisenbaker noted in his written statement that Mr. Wells told him that he never signs anything without reviewing things with the Committee first. (R-46). When Mr. Wisenbaker told Mr. Wells about the October 24, 2016 meeting, Mr. Wells responded that he should not "worry about that, this is between me and KC." (R-46).

[18] Mr. Griggs described the meeting as the "most dysfunctional meeting I have ever been to out here." (Tr. 357-358; R-32, p. 2).

[19] In fact, when Mr. Colone filed Grievance 13-2016, Mr. Mosley approached him about rewording it so it would be more likely to accomplish something. (Tr. 411-413; R-31). Mr. Mosley believed

(Tr. 411-414, 417-420, 422-424, 474-475; R-6; R-39; R-40). This included dispelling false information that the operators received. (Tr. 425-427; R-45). In fact, Mr. Mosley hoped to be the first Production Manager that could work with Mr. Colone. (Tr. 452).

Mr. Colone became more agitated during this part of the discussion. (Tr. 473). Given Mr. Mosley's preexisting disappointment and the tense environment of the meeting, Mr. Mosley became frustrated. The fact that Mr. Colone repeatedly interrupted him and accused him of "changing his plan" did not help matters. (R-46). Mr. Mosley tried to explain that he wanted the Union and the Company to work together, but Mr. Colone kept talking over him. (Tr. 477; R-46). The two began to argue. (Tr. 473). Mr. Mosley tried to leave the meeting, but Mr. Wisenbaker would not let him.[20] (Tr. 431; R-46). At some point, Mr. Mosley told Mr. Colone that he was "not helping me make it any better." (Tr. 430). Mr. Colone responded that Mr. Mosley was hurting the Union. (Tr. 81, 430).

Mr. Colone's account of Mr. Mosley's statements differs slightly. He testified that Mr. Mosley told him, "You ain't gonna make it."[21] (Tr. 83). According to Mr. Mosley, any comment he made about "making it" had to do with Mr. Colone's refusal to work with Mr. Mosley on the Pigment project. (Tr. 433). Mr. Mosley was not threatening Mr. Colone's job in any way. (Tr.

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he had made progress with Mr. Colone, but Mr. Colone re-filed the Grievance and effectively told Mr. Mosley to stay out of Pigment. (Tr. 413; R-5). Unlike Mr. Colone, Mr. Griggs and Mr. Zamora were willing to work with the Company. (Tr. 417-148; R-42; R-43; R-44). In fact, they submitted constructive feedback on the automation process, which allowed Mr. Mosley to move the project forward successfully. (Tr. 417, 422-424). Mr. Mosley testified "[i]t was fortunate that we [have] operators out there that were still willing to give us some legitimate concerns about why this isn't going to work." (Tr. 424).

[20] Mr. Griggs later told Ms. Lord that Mr. Mosley got up to leave because he was so frustrated with Mr. Colone. Mr. Griggs also said that he believed Mr. Mosley stayed because Mr. Mosley wanted a resolution. (R-32, p. 2-3).

[21] Mr. Wisenbaker testified he did not hear Mr. Mosley threaten Mr. Colone in the meeting. (Tr. 477).

433). The General Counsel did not call Mr. Griggs during his case in chief as a corroborating witness for Mr. Colone (presumably in order to shield from production the Affidavit that Mr. Griggs provided to the Region during the investigation of the Charge). Rather, Respondent subpoenaed Mr. Griggs to testify in its case in chief.

Mr. Mosley admits he could have handled himself more professionally, and wishes that he had. (Tr. 430). Mr. Wisenbaker testified that he should have done a better job keeping the meeting under control. (Tr. 479). Mr. Griggs did not believe a resolution would be possible because of the anger and frustration by Mr. Wisenbaker, Mr. Mosley and Mr. Colone.[22] (R-32). As was his custom, Mr. Colone never acknowledged the role he played escalating the tension of the meeting.[23]

After Mr. Mosley's alleged "you ain't gonna make it" statement, Mr. Colone denied the resolution of the Grievances and left the meeting.[24] (Tr. 431-432, 477; R-46). All of the unresolved Grievances already included the Company's position at Step 3.[25] (Tr. 405-406, 475-476). Not long after, Mr. Colone reported the issue and purportedly filed a Grievance with Ms. Lord regarding the October 24, 2016 meeting.[26] (Tr. 84). Mr. Colone did not know what happened to the Grievance; he only speculated that it "sat on Trudy Lord's desk for almost three months, or a little

[22] Although Mr. Griggs told Ms. Lord that Mr. Wisenbaker, Mr. Mosley and Mr. Colone all acted inappropriately, he believed Mr. Wisenbaker and Mr. Mosley should be held to a higher standard of conduct. (R.-32, p. 4-5).

[23] Mr. Colone only testified that he and Mr. Wisenbaker were doing most of the talking. (Tr. 82).

[24] Mr. Colone testified that he denied the Grievances after the meeting. (Tr. 84). He also represented in a written statement that he left the meeting without denying the Grievances.

[25] Because Mr. Colone cannot recall whether the Company's position at Step 3 was already included in the Grievances that he denied on October 24, 2016, Mr. Colone testified, without any supporting evidence, they were "doctored" or falsified. (Tr. 149-151; 167-168)

[26] There is no documentary evidence of this Grievance in the record. To the extent Mr. Colone filed such a Grievance, the General Counsel does not allege that Respondent disciplined or discharged Mr. Colone for filing it.

bit over three months." (Tr. 84). Despite Mr. Colone's unsupported and false testimony that Ms. Lord took no action, the evidence demonstrates that she immediately began to investigate the incident.[27]

First, Ms. Lord received a written account of the meeting from Mr. Wisenbaker on November 3, 2016. (R-46). Mr. Wisenbaker testified that he prepared this statement after the meeting because he felt like there would be further discussion on the meeting, and he wanted to memorialize his thoughts while they were clear in his head. (Tr. 479). Mr. Wisenbaker described the tension in the meeting, and the actions of the participants. (R-46). He did not identify any threat by Mr. Mosley (R-46).

Ms. Lord also interviewed Mr. Griggs on November 3, 2016.[28] She took contemporaneous notes during the conversation. (Tr. 340). Mr. Griggs told Ms. Lord that Mr. Wisenbaker said they were there to discuss three Grievances, and that he could feel the friction in the air from the start. (R-32, p. 1). As to the first Grievance they discussed, Mr. Griggs stated that he believed that Mr. Colone's "beef" should be with the Union Committee. (R-32, p. 2). As to the overall meeting, he simply felt that it "wasn't good" and he "didn't think anything about it other than there were no resolutions." (R-32, p. 3). Mr. Griggs specifically told Ms. Lord that he did not perceive Mr. Mosley as being threatening. (R-32, p. 3). He did inform Ms. Lord, however, that Mr. Colone

[27] As noted above, Ms. Lord was out of town on October 24, 2016, so Mr. Wisenbaker and Mr. Mosley conducted the Step 3 meeting.

[28] Ms. Lord regularly took contemporaneous notes when interviewing individuals in connection with her investigations. (Tr. 340). At the Hearing, Mr. Griggs had ample opportunity to review Ms. Lord's notes from her three interviews of Mr. Griggs. (Tr. 369-370). While Mr. Griggs testified there were some sentences that did not make sense to him, he only identified one statement that he believed to be inaccurate. (Tr. 373). He did not believe he identified Mr. Colone as the aggressor, as he did not believe that any person stood out as the aggressor. (Tr. 373). Mr. Griggs also testified he had no reason to doubt the accuracy of Ms. Lord's notes. (Tr. 368).

called him the day after the meeting to talk to him about how Mr. Mosley "threatened him." (361-362).

Ms. Lord engaged in additional investigatory steps before concluding there was no evidence to corroborate Mr. Colone's allegation that Mr. Mosley had threatened him. (Tr. 274-275).

Despite Ms. Lord's efforts, which Mr. Colone refuses to acknowledge, Mr. Colone labeled that the entire investigatory process as "a cover-up." (Tr. 85). Respondent disagrees and presented evidence at the Hearing that demonstrates there was simply inadequate evidence to substantiate Mr. Colone's allegation. At the Hearing, the General Counsel declined to even question Ms. Lord about her investigation. Additionally, as mentioned above, the General Counsel did not call Mr. Griggs, the only other Union witness who was present at the meeting. It is abundantly clear that the General Counsel chose not to call Mr. Griggs so that the information that is set forth in the affidavit he provided to the Board would be shielded and not subject to production to Respondent.

It is important to note that Mr. Colone was not disciplined for his behavior in the October 24, 2016 meeting, and the General Counsel does not contend that the October 24, 2016 meeting motivated any discipline or Mr. Colone's discharge.

F. Respondent sends Mr. Colone a letter on April 3, 2017 because he provided false information in connection with a withdrawn Grievance.

On March 22, 2017, Mr. Colone submitted a Grievance on behalf of Gerardo Zamora and William Fobbs, alleging that the Company was improperly staffing operators in the Reactor area. (GC-3). The Company began investigating Mr. Colone's allegations and discovered that neither Mr. Fobbs nor Mr. Zamora had been instructed to engage in unsafe acts. (R-48). More critically, Respondent discovered that neither Mr. Fobbs nor Mr. Zamora agreed with Mr. Colone's allegations in the Grievance, neither asked Mr. Colone to file a grievance on their behalf, and

neither knew Mr. Colone had filed a grievance on their behalf. (Tr. 37-38, 44). Respondent reasonably believed that Mr. Colone's misrepresentations in the March 22, 2017 Grievance constituted intentional falsehoods. Before Respondent could discipline Mr. Colone, he withdrew the Grievance because it set forth false information. (Tr. 85). He then submitted a letter in which he apologized for being "misinformed."[29] (Tr. 39; GC-4). Mr. Colone also stated that the inaccurate information he received did not come from Mr. Fobbs or Mr. Zamora. (GC-4).

At best, Mr. Colone failed to take any steps to follow up on the information that he purportedly received. At worst, he recklessly (if not intentionally) misrepresented facts in an effort to impede the harmonious relationship between the Union and the Company – a relationship he agreed to promote.[30] (J-1). Regardless, Mr. Colone's actions in association with the March 22, 2017 Grievance violated the Plant Rules. (GC-2; R-2). Further, because the Grievance was baseless, the time spent investigating it represented an unnecessary expenditure of Respondent's resources.

On March 23, 2017, Mr. Colone refiled his Grievance (Grievance 3-2017) on behalf of USW workers. (GC-5). He alleged that the Company did not properly staff the reactor area. (GC-5). Mr. Colone submitted a statement in support of the Grievance, in which he accused Mr. Mosley of having "amnesia," and asking him multiple times about whether they had an agreement. (GC-2). Despite Mr. Colone's argumentative behavior, this Grievance was resolved satisfactorily at Step 2 on March 28, 2017. (GC-5).

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[29] Notably, Mr. Colone did not apologize for his conduct; he only apologized for being "misinformed." (Tr. 39; GC-4).

[30] Respondent submits this is the more likely explanation. In his "apology," Mr. Colone admits that he was misinformed and acknowledges he did not receive information related to the Grievance from the identified grievants. (GC-4). The reasonable inference from Mr. Colone's statements is that he did not speak to either Mr. Fobbs or Mr. Zamora before he filed a grievance on their behalf, which must be a prerequisite before a Grievance is filed for a specific person.

At the advice of legal counsel, Ms. Lord prepared a letter for Mr. Colone. (Tr. 278; GC-2). In the letter, Ms. Lord advised Mr. Colone about the results of the Company's investigation into the Grievance. (GC-2). She also advised Mr. Colone that fabrication or falsification of information could be grounds for discipline. (GC-2). Finally, she warned Mr. Colone that his ongoing personal attacks of Mr. Mosley violated Plant Rules. (GC-2).

It is clear from the face of the letter and the testimony at the Hearing that Respondent did not issue the letter in an effort to chill or in response to Mr. Colone's Union activity. (Tr. 45-48). Its sole purpose was to persuade Mr. Colone to cease behavior that violated the Plant Rules, such as disrespecting his supervisor and providing false information. (Tr. 45-48).

G. Mr. Colone receives a verbal warning for his conduct at and following the July 12, 2017 safety meeting.

Every month, Mr. Dean conducts a safety meeting for each of the four shifts.[31] (Tr. 384) Each meeting has an agenda as well as time at the end for employees to ask questions and for general discussion. (Tr. 384).

On July 12, 2017, Mr. Dean conducted the July safety meeting.[32] (Tr. 17). The C-shift meeting began like any other: with a substantive discussion at the beginning that transitioned into an open forum where the attendees could ask questions. (Tr. 90-91). Mr. Colone testified that prior to the meeting, employees spoke to him about certain issues that needed to be addressed. Mr. Colone said that he instructed them that "[w]hen they come up to discussion, say what you all need to say." (Tr. 90). Mr. Colone did not offer to ask questions on the employees' behalf. (Tr. 90). Mr.

[31] In his role as the Safety and Security Manager, Mr. Dean had conducted more than 200 safety meetings. (Tr. 385). He has led numerous safety meetings that Mr. Colone attended. (Tr. 385-386).
[32] Approximately twenty C-shift employees were in attendance. (Tr. 15). The General Counsel only called one other employee – Jonathan Bailey – in his case in chief and as a corroborating witness for Mr. Colone.

Colone did not testify that the employees did not ask Mr. Colone to ask questions on their behalf. (Tr. 90).

In the open forum, Chris Cleary, a bargaining unit member, asked the first question about forced overtime and fatigue. (Tr. 18, 91, 386-387). Mr. Dean purportedly seemed doubtful that Mr. Cleary was being required to work more hours than permitted by the policy.[33] (Tr. 19, 91-92). At that point, Jonathan Bailey,[34] another bargaining unit member, advised Mr. Dean that he too had been working in the manner Mr. Cleary described.[35] (Tr. 19). According to Mr. Colone, Mr. Bailey was upset and "outdone."[36] (Tr. 92). Others then stated they too had been forced to work more than the permitted number of hours. (Tr. 19).

At the hearing, Mr. Colone was confident about what happened next. He testified that Mr. Dean "jumped out of his seat" and began gesturing[37] while he claimed that he was in discussion

[33] Mr. Colone testified that Mr. Dean was "pretty much telling him he was a liar." (Tr. 92).

[34] Mr. Bailey has worked for Respondent for a little more than six years. (Tr. 13) At the time of the July safety meeting, he was a Coagulator. He currently holds a Recovery Operator position. (Tr. 13). Mr. Bailey also serves as a Union Steward, but it was not established at the Hearing whether he held that position at the time of the July safety meeting. (Tr. 14).

[35] According to Mr. Colone, Mr. Bailey became upset. (Tr. 92). He went on to say that "he was outdone." (Tr. 92). No other witness testified that Mr. Bailey became upset, including Mr. Bailey.

[36] At no point does Mr. Bailey describe himself as responding in this manner. (Tr. 13-22; GC-1). No other evidence supports Mr. Colone's description of Mr. Bailey becoming upset.

[37] No other witness corroborated this fact. When asked, Mr. Bailey denied that Mr. Dean unprofessionally. (Tr. 26-27). Mr. McCray testified that Mr. Dean was standing the entire time. (Tr. 343). Finally, Mr. Dean testified that he was standing the entire time, as he always does when conducting safety meetings. (Tr. 387-388). He specifically testified that he did not jump up or point his finger at anyone. (Tr. 392). Indeed, Mr. Colone never mentioned this particular observation in his meeting with Ms. Lord or in the Affidavit he submitted to the Region as part of its investigation into his Charge No. 16-CA-203509, which Mr. Colone reviewed for accuracy. (Tr. 213-215). The only conclusion that can be drawn is the Mr. Colone offered false testimony regarding Mr. Dean "jumping out of his seat" to prove a point to the attendees.

about increasing the employees' hours further.[38] (Tr. 20, 92, 211-213). Indeed, it was not enough for Mr. Colone to remain seated to deliver this testimony; he had to stand, presumably to better demonstrate Mr. Dean's alleged reaction to the line of questioning. (Tr. 92).

According to Mr. Colone, after Mr. Dean "threatened" to increase the hours, everyone began "chiming in, boom, boom, boom . . . going back and forth."[39] (Tr. 92). People were frustrated, and "everybody started talking at the same time." (Tr. 21, 52, 348, 391; R-1). Mr. Colone then asked whether the Company would be liable if a fatigued employee got into an accident on his way home.[40] (Tr. 20, 93, 390). Mr. Dean said that he did not know, and that it may depend on the circumstances. (Tr. 20, 93-94, 390-391). Mr. Colone asked this question at least two more times.[41] (Tr. 24, 93-94). Mr. Colone's repeated questions only frustrated the attendees further. (Tr. 53, 55).

At one point, Sherman McCray, a bargaining unit member got up to leave.[42] (Tr. 22-23, 344-345, 391-392). He was frustrated at the argumentative nature of the meeting and felt like this

[38] Mr. Dean explained that he was describing guidelines that established hours for a "work set" as opposed to a "work week." (Tr. 388-389). These guidelines had been discussed in the Joint Resolution Committee meeting that had occurred earlier that week. (Tr. 55). Mr. Colone had been in attendance. (Tr. 389-390). Mr. Dean elaborated that American Petroleum Institute ("API") recommends centering hours around a work set versus a work week, which actually reduces the number of days one can work in a row. (Tr. 387). After the meeting, Mr. Bailey told Mr. Dean that, upon his personal review of the API standards, he believed the new proposal would be a benefit to the employees. (Tr. 397). Respondent has since adopted the API standard. (Tr. 388-389).

[39] Mr. Bailey described everyone as "bickering, moaning, and complaining." (Tr. 20).

[40] No one else asked questions on this topic. (Tr. 25).

[41] Mr. Bailey acknowledged it could have been four or five times. (Tr. 27).

[42] Mr. McCray has worked for Respondent for approximately nine years. (Tr. 341). He is a Reactor Operator. (Tr. 341). He does not hold any elected position. (Tr. 341). He has filed grievances in the past, however. (Tr. 349). Mr. McCray testified he also asked a question about fatigue at the July safety meeting. (Tr. 343).

issue was better suited for a Joint Resolution Committee meeting. (Tr. 345). Initially, Mr. Dean was able to convince Mr. McCray to stay, but as Mr. Colone's interrogation of Mr. Dean continued, Mr. McCray again stood to leave. (Tr. 392). Mr. Colone told him "go on, get out of here, we don't need you here anyway." (Tr. 346, 392). The General Counsel did not recall Mr. Colone to rebut this testimony.

The exact exchange between Mr. Colone and Mr. Dean is unclear, but four things are not disputed. First, Mr. Colone repeatedly asked Mr. Dean the question regarding liability.[43] (Tr. 20, 23, 93-94, 96, 390-391) Second, it was clear that Mr. Dean did not have a suitable answer for Mr. Colone.[44] (Tr. 21, 55, 93-94, 390-391). Third, Mr. Dean had become obviously frustrated with Mr. Colone's repeated questioning. (Tr. 25, 391). Finally, Mr. Colone's behavior toward Mr. Dean did not conclude along with the meeting. (Tr. 55).

As other attendees filed out of the meeting room, Mr. Colone approached Mr. Dean.[45] (Tr. 55, 97, 393). Mr. Colone asked Mr. Dean for paperwork regarding the API standard. (Tr. 97, 393). Mr. Dean offered to show Mr. Colone the website where it could be found, but, according to Mr. Colone, said "I ain't giving you nothing."[46] (Tr. 98). Mr. Colone's repeated inquiries began anew.

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[43] Mr. Colone testified that he repeatedly asked Mr. Dean the same question "[b]ecause of the conditions the guys was working in." (Tr. 96). But, because Mr. Dean did not know the answer to Mr. Colone's question the first time, this explanation makes no sense.

[44] Mr. Bailey testified that Mr. Dean "obviously didn't know an answer." (Tr. 21). Even Mr. Colone admits that Mr. Dean kept saying that he did not know the answer to Mr. Colone's question regarding liability. (Tr. 92-93).

[45] Neither Mr. Bailey nor Mr. McCray had any knowledge about Mr. Colone approaching Mr. Dean after the meeting. (Tr. 23).

[46] Based on the on-the-record observations of both Mr. Dean and Mr. Colone at the hearing, it seems highly unlikely that Mr. Dean would make a statement that includes multiple grammatical errors. It seems much more likely that Mr. Colone either took Mr. Dean's words and put his own personal "spin" on them, or fabricated Mr. Dean's response all together. Mr. Dean testified that he

This time he asked Mr. Dean "[a]re you mad" and/or "[a]re you upset."[47] (Tr. 212). Mr. Dean acknowledges he became "loud," along with Mr. Colone.[48] (Tr. 393). The fact of the matter is, Mr. Colone knew that Mr. Dean was frustrated by what had transpired, and he was intentionally goading Mr. Dean in an apparent effort to be argumentative, intimidating, and hostile. (GC-6).

After the meeting, Mr. Dean reported what transpired to Mr. Wisenbaker.[49] (Tr. 394, 460-461). Mr. Dean felt it was important to inform Mr. Wisenbaker because of the way Mr. Colone treated Mr. McCray during the meeting and because of the way Mr. Colone approached Mr. Dean after the meeting. (Tr. 393-394, 461). Mr. Dean also told Mr. Wisenbaker about the manner in which Mr. Colone asked questions during the open forum. (Tr. 461). Mr. Dean had never reported Mr. Colone's conduct in a safety meeting before. (Tr. 394). Mr. Wisenbaker issued Mr. Dean a verbal warning for his conduct. (Tr. 53, 394, 462-463). It was the first time Mr. Dean had ever been disciplined during the time he worked at the Plant. (Tr. 394).

Mr. Wisenbaker told Ms. Lord about the safety meeting and asked her to investigate. (Tr. 462). After speaking with Mr. Colone about what transpired, Ms. Lord began an investigation.[50] (Tr. 289). A written statement that Mr. Colone provided regarding what occurred at the meeting

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told Mr. Colone he gave a copy of the guidelines to Mr. Wells and that they were available online. (Tr. 393).

[47] Mr. Dean testified that Mr. Colone also accused him of not doing his job. (Tr. 393).

[48] Mr. Dean testified that he regretted raising his voice when Mr. Colone confronted him after the meeting concluded. (Tr. 394).

[49] Mr. Dean also visited Ms. Lord's office to report what transpired in the safety meeting. (Tr. 289). Although Ms. Lord was on the phone, she could see that Mr. Dean was visibly upset. (Tr. 289).

[50] The General Counsel did not ask Ms. Lord <u>any</u> questions about her investigation during his case in chief.

and others who were in attendance served as the roadmap for her investigation. (Tr. 289). Ms. Lord interviewed several people in connection with her investigation, including Mr. McCray and Mr. Bailey. (Tr. 289).

Ms. Lord interviewed Mr. Bailey within a week of the meeting. (Tr. 26). Ms. Lord took notes during that meeting.[51] (Tr. 26). During the interview, Mr. Bailey told Ms. Lord that Mr. Dean seemed frustrated but denied that Mr. Dean was rude or unprofessional.[52] (Tr. 26). Mr. Colone, naturally, later testified that he disagreed with Mr. Bailey's recollection of events, even though the General Counsel called Mr. Bailey as his first witness in his case and chief and as the only corroborating witness for Mr. Colone. (Tr. 116).[53]

Ms. Lord and Mr. Wisenbaker conducted a follow-up interview with Mr. Colone and his Union representative on July 18, 2017. (Tr. 56). During this meeting, Mr. Colone became aggressive and angry. (Tr. 56). Mr. Colone was sitting near Mr. Wisenbaker, whom Mr. Colone made feel threatened. (Tr. 56). At the investigatory meeting, Mr. Colone provided information that stood in direct conflict with other information that Ms. Lord had obtained as part of her investigation into the safety meeting incident. (Tr. 56, 463).

[51] Mr. Bailey testified that he had no reason to believe that Ms. Lord would inaccurately write down what he was saying. (Tr. 27).

[52] Approximately six months later, Mr. Bailey prepared a statement at the request of Mr. Colone. (Tr. 28; R-1). This statement omits various details that Mr. Bailey provided in the investigatory interview that Ms. Lord conducted in close proximity with the July safety meeting.

[53] Mr. Bailey was the first witness called by General Counsel. Mr. Colone was present in the Hearing room and heard Mr. Bailey testify.

On July 20, 2017, Ms. Lord and Mr. Wisenbaker issued a verbal warning in a meeting with Mr. Colone.[54] (Tr. 290; GC-6). In the Performance Correction Notice, Respondent reminded Mr. Colone about the cautionary advice it provided to him in the April 3, 2017 letter, and told Mr. Colone he had exhibited the same unacceptable conduct at the safety meeting and in the follow-up interview. (Tr. 51, 54; GC-6). Not only did the verbal warning reference Mr. Colone's aggressive, hostile, and intimidating conduct, but also his ongoing fabrication of information. (GC-6). Again, Respondent warned that future instances of misconduct, which violated Plant Rules, would be grounds for further discipline and/or termination. (GC-6).

During the July 20, 2017 meeting, Mr. Colone again "became irate," would not listen or let Ms. Lord or Mr. Wisenbaker speak.[55] (Tr. 291, 464). At one point, he got so close to Mr. Wisenbaker that Mr. Wisenbaker had to ask him to "sit back" or "back up a little." (Tr. 291-292, 464). Mr. Colone also called certain people involved in the investigation liars. (Tr. 291).

Several things should be noted. First, at the hearing, Ms. Lord testified that it was not the mere act of asking questions that Respondent considered to be aggressive. (Tr. 56-57, 290). Instead, it was the repetition, the tone, and the way he intimidated and berated Mr. Dean that warranted discipline. (Tr. 56-57, 290). Second, besides Mr. Dean, no other employee received discipline for asking questions at the safety meeting, even though several others asked questions on the same topic.[56] (Tr. 51-53, 290, 346). Finally, Mr. Colone regularly asked questions in the

[54] Ms. Lord, Mr. Wisenbaker, and Ms. Sharp were involved in the decision to issue this discipline. (Tr. 289, 463). They consulted with legal counsel before making this decision. (Tr. 463). Mr. Mosley was not involved in this decision. (Tr. 463).

[55] An audio recording of this meeting was submitted into evidence as a joint exhibit. (J-2).

[56] Ms. Lord testified that she learned several others had asked questions during her investigatory process. (Tr. X)

monthly safety meetings. (Tr. 27-28, 391). But, there is no evidence in the record that Mr. Colone asked questions in the same, inappropriate manner at any other safety meeting.

Because of Mr. Colone's inappropriate behavior in the meeting on July 20, 2017, Ms. Lord sent Mr. Colone another letter to encourage him to improve his behavior.[57] (Tr. 291; R-16). This letter was only intended to help Mr. Colone correct his behavior; it was not intended as formal discipline. (Tr. 293). Again, Ms. Lord advised Mr. Colone that this was the same behavior that resulted in the April 3, 2017 letter and the verbal warning. (R-16). Because of Mr. Colone's ongoing misconduct, Ms. Lord advised Mr. Colone that no member of management would meet with him on an individual basis until he has demonstrated an ability to conduct himself in a civil, respectful, and professional manner. (R-16). Ms. Lord also emphasized that the letter was not intended to chill Mr. Colone's exercise of Union activities. (R-16). Mr. Wisenbaker testified that the verbal warning was not issued to Mr. Colone because he engaged in Union activities. (Tr. 464-465).

On July 27, 2017, Mr. Colone filed a Grievance 9-2017 on his own behalf, requesting that Respondent remove the verbal warning from his disciplinary file. (R-17). Respondent denied the Grievance at all three Steps because the Grievance did not allege that a violation of the Agreement occurred. (Tr. 293-294; R-17). Mr. Colone also filed Charge No. 16-CA-203509 as a result of the verbal warning.

H. Mr. Colone receives a first written warning for failing to follow operational guidelines.

On July 7, 2017, Mr. Colone failed to apply steam to a line after making up a batch of Flexone. (R-18). A root case analysis was conducted, which determined that Mr. Colone did not

[57] Mr. Colone testified that he did not recall receiving this letter, but acknowledged that he could have. (Tr. 218).

apply steam to the line. (Tr. 480; R-18). As a result, the Flexone hardened in the pipe. (Tr. 480-481; R-18). The only way to clear the Flexone from the pipe is to break the pipe out, clean it, and then reassemble it. (Tr. 481). It took two days of downtime to do this. (R-18).

After the investigation was complete, Respondent issued a first written warning to Mr. Colone on August 14, 2017. (R-18). Mr. Wisenbaker made the decision to issue the discipline. (Tr. 482). Ms. Lord was involved in the administration of this discipline, though she did not participate in the investigation. (Tr. 294). Mr. Mosley was not involved in the decision to issue this discipline. (Tr. 438-439).

The General Counsel does not contend this disciplinary action is the result of Mr. Colone's Union or protected concerted activities.[58] Indeed, the Region investigated Mr. Colone's allegation that this disciplinary action constitutes a violation of the Act. (R-29). The Region's investigation determined that the evidence supported that Respondent disciplined Mr. Colone because of performance errors. (R-29).

Mr. Colone disagrees with the General Counsel's position and the Region's conclusions. He testified that this disciplinary action is the result of his Union activities and that he was falsely accused. (Tr. 256-257). Mr. Colone offers nothing to support his allegation that he was falsely accused. The Region's investigation and dismissal of the Charge, the absence of any complaint allegation regarding this incident, precludes Mr. Colone's argument the first written warning was unlawfully issued.

[58] In fact, in an objection, the General Counsel stated "There's no allegation that he was fired because of this incident." (Tr. 481). While the General Counsel may not believe this incident motivated the decision to terminate Mr. Colone, it is undeniably part of the Last Chance Agreement. (GC-7).

I. Mr. Colone receives a second written warning for failing to follow operational guidelines.

On September 30, 2017, Mr. Colone made a batch of soap with a high pH level. (R-23). This did not meet specification and resulted in 458,000 gallons of off-spec latex. (R-23). It took more than two weeks to rework the "out of spec" material into usable material. (R-23).

Respondent conducted a root cause investigation into the incident, and determined that Mr. Colone violated a procedure by failing to have the soap tested by the laboratory. (R-23). It was Mr. Colone's responsibility to verify and validate the sample. He failed to do so. Accordingly, the Company issued him a second written warning on October 20, 2017.[59] (R-23). Mr. Wisenbaker made the decision to issue the discipline, in consultation with Ms. Sharp and legal counsel. (Tr. 482). Neither Ms. Lord nor Mr. Mosley participated in this decision. (Tr. 295, 441-442).

Just like the first written warning, the General Counsel does not contend this disciplinary action is the result of Mr. Colone's Union or protected concerted activities. After Mr. Colone filed a ULP charge regarding this warning notice, the Region investigated this allegation and determined that the evidence showed that Respondent disciplined Mr. Colone because of performance errors. (R-29). Mr. Colone disagrees – he also believes this disciplinary action evidences discrimination. (Tr. 256-257; R-24). The Region's investigation and dismissal of the Charge, the absence of any complaint allegation regarding this incident, precludes Mr. Colone's argument the second written warning was unlawfully issued.

J. Respondent offers Mr. Colone a Last Chance Agreement because of his ongoing intentional falsification of information.

Respondent decided to present Mr. Colone with a Last Chance Agreement because of a series of misconduct by Mr. Colone that, when viewed in the aggregate, warranted next-level

[59] At the Hearing, Mr. Wisenbaker confirmed that the narrative in the Performance Correction Notice accurately describes the incident. (Tr. 482).

discipline.[60] (Tr. 315). The goal of the Last Chance Agreement was to illustrate the misconduct that was unacceptable at the Plant in hopes that Mr. Colone would understand what behavior he needed to correct. (Tr. 62-63). It was not Respondent's intent to terminate Mr. Colone, or else Respondent would have bypassed the Last Chance Agreement. (Tr. 486). Ms. Lord, Mr. Wisenbaker, and Ms. Sharp made the decision to issue the Last Chance Agreement after consultation with legal counsel. (Tr. 63, 485).

Mr. Colone chose not to sign the Last Chance Agreement, which he knew would result in his separation from employment. (Tr. 137-138). Indeed, Mr. Colone acknowledges that he was terminated because he did not sign the Last Chance Agreement. (Tr. 137-138). At no time did Mr. Colone testify that he disagreed with the Last Chance Agreement's terms; he only stated that he disagreed with the allegations that the Last Chance Agreement contained.[61] (Tr. 137-138).

1. The November 7, 2017 Incident

On November 7, 2017, a soap line became plugged. (GC-7). Mr. Colone assisted in the efforts to unplug the line, which resulted in a significant amount of pipe being "broken out" to determine the issue. (GC-7). At one point during the investigation, Mr. Colone opened a valve, which allowed the Flexone to begin flowing again. (GC-7). Because Mr. Colone failed to properly troubleshoot the line and correctly identify the cause of the flow issue, the Company experienced downtime and lost productivity. (GC-7). Further, Mr. Colone provided false information during the investigation and called another employee a liar. (GC-7). Because Mr. Colone's conduct in

[60] Ms. Lord testified that Respondent had respect for Mr. Colone's status as Union representative. (Tr. 292). As a result, she handled him with "kid gloves." (Tr. 292). This caused others to question why Mr. Colone was allowed to get away with misconduct for which others were held accountable. (Tr. 292).

[61] Neither the General Counsel nor the Union challenge the terms of the Last Chance Agreement as unlawful or otherwise violative of the Act. Further, Ms. Lord testified that the Union has never challenged the substance of the Company's Last Chance Agreements. (Tr. 315-316).

connection with this incident represented continued violations of the Plant Rules, as well as job performance issues, Respondent made reference to it in the Last Chance Agreement. (Tr. 63). Notably, the General Counsel did not ask Mr. Colone a single question about this incident at the Hearing.

2. The November 15, 2017 Grievance

On November 13, 2017 (incorrectly stated as November 15, 2017 in the Last Chance Agreement), Mr. Colone submitted Grievance 14-2017, alleging that unidentified members of management were falsely accusing workers of sabotage.[62] (GC-9; R-25). Mr. Colone asked Ms. Lord to investigate this Grievance, and so she did. (Tr. 295-296).

Initially, Ms. Lord was unable to uncover anything because she did not have sufficient information, such as who made the comment, who heard the comment, etc. (Tr. 296). Nevertheless, Ms. Lord agreed to advance the Grievance to Step 2 so she could have additional time to conduct the investigation. (Tr. 296). Around that time, Mr. Colone provided Ms. Lord with names of individuals to interview, including Fred Owens, as Mr. Colone said he learned of the sabotage allegation from Mr. Owens. (Tr. 297). Mr. Owens could not identify the person who allegedly made the comment, however. (Tr. 297-298). Ms. Lord then interviewed Supervisor Glenn Judices to ask about the sabotage allegation. Mr. Judices denied he had made the allegation himself. (Tr. 299). He also said he knew nothing about the allegation; he had only heard from Mr. Owens, who said that Mr. Colone said someone was accusing the operators of sabotage. (Tr. 298-299).

[62] Mr. Colone contends this allegation demonstrates a violation of Section 17.1 of the Agreement. (R-25). It is clear from a review of the Agreement that this Grievance does not actually allege a violation of the Agreement. (J-1).

Later, Mr. Colone changed his story, and attributed the sabotage allegation to Mr. Mosley.[63] (GC-7). He also stated that Mr. Mosley is a liar if he denies he made the comment. (GC-7). Mr. Colone had no explanation for his failure to identify Mr. Mosley as the one responsible for the comment in his Grievance. He simply said that he could have. (Tr. 238).

Again, the act of submitting the Grievance did not result in the Last Chance Agreement; it was Mr. Colone's continued behavior of providing false information. (Tr. 64-65).

3. Grievance 1-2018

On February 15, 2018, Mr. Colone submitted Grievance 1-2018 on behalf of William Butler, alleging that Warehouse Manager Randy Watson created a hostile work environment for Mr. Butler. (GC-10). Ms. Lord assisted Mr. Watson and Johnny Murray, Director of the Warehouse, with the investigation into the Grievance. (Tr. 299-300).

No one corroborated Mr. Colone's allegation. (Tr. 300). When apprised of this fact, Mr. Colone told Ms. Lord that Larry Burton, a bargaining unit employee, told him that he had witnessed Mr. Watson curse at Mr. Butler and point his finger in Mr. Butler's face. (Tr. 301-303). When Ms. Lord spoke to Mr. Burton, he denied providing Mr. Colone with that information. (Tr. 300-302). Ms. Lord informed Mr. Colone about Mr. Burton's response, and Mr. Colone accused Ms. Lord of not asking the right questions. (Tr. 302). So, she brought Mr. Burton in for a second interview. (Tr. 302). Mr. Burton still did not corroborate the allegation Mr. Colone submitted in the Grievance. (Tr. 302). Again, Mr. Colone told Ms. Lord that she did not ask the question appropriately. (Tr. 302). To satisfy Mr. Colone and ensure she had obtained all pertinent information, Ms. Lord conducted a follow up interview with Mr. Burton. (Tr. 302, 328). She asked him directly "Did you tell Mr. Colone and Mr. Butler that you heard Randy Watson cussing Mr.

[63] The fact Mr. Mosley participated in the investigation to identify who made the alleged sabotage comment further evidences that Mr. Colone did not contend that Mr. Mosley made the comment.

Butler and point his finger in his face." (Tr. 302-303). Mr. Burton said he did not. (Tr. 303). Ms. Lord's contemporaneous notes reflect that fact. (Tr. 303-304; R-38).

Respondent's investigation revealed that Mr. Colone either recklessly or intentionally submitted false information in support of Grievance 1-2018. (GC-7). Again, the act of submitting the Grievance did not result in the Last Chance Agreement; it was Mr. Colone's unrelenting pattern of providing false information. (Tr. 65).

4. Grievance 2-2018 and Grievance 4-2018

On March 23, 2018, Mr. Colone submitted Grievance 2-2018 and Grievance 4-2018 on behalf of Christopher Granlee.[64] (R-27; R-28). In connection with these Grievances, Mr. Colone submitted a statement. (GC-28). In Mr. Colone's statement, he represented (or at the very least, he implied) that he had personal knowledge that Cheryl Benoit, an HR Representative, told Mr. Granlee that if he had been off of work for six months (instead of five), then he would have been retrained. (Tr. 310; GC-28). Mr. Colone also represented that he had personal knowledge that Mr. Dean gave Mr. Granlee a blue hardhat, which permanent employees receive – not an orange hat, which temporary employees receive. (GC-28). Finally, Mr. Colone represented that Baler area workers told him that Si Ancelet, an employee in the safety department, said they would have to be trained and qualified in order to sign off on certain processes.[65] (Tr. 312; GC-28).

Ms. Lord conducted the investigation. (Tr. 309-310). She spoke to Ms. Benoit, who denied that she ever had a conversation with Mr. Granlee about training. (Tr. 311). She spoke to Mr. Dean,

[64] Mr. Colone also submitted Grievance 3-2018 on behalf of Mr. Granlee, but the Last Chance Agreement is totally unrelated to that Grievance. (GC-7; GC-12). Mr. Granlee was terminated for a life-critical violation of a safety rule. (Tr. 451).

[65] This is a critical distinction, as it is the only evidence that Mr. Colone offers in support of the Grievances that he acknowledges came from third parties.

who advised her that he does not hand out hard hats.[66] (Tr. 311). Finally, she spoke to Mr. Ancelet, who denied making the comment. (Tr. 312).

Yet again, Ms. Lord had determined that Mr. Colone had either recklessly or intentionally provided false information. The act of submitting the Grievance did not result in the Last Chance Agreement; it was Mr. Colone's continued behavior of providing false information. (Tr. 65).

K. Mr. Colone is discharged because he refused to sign the Last Chance Agreement.

On June 8, 2018, Ms. Lord and Ms. Sharp met with Mr. Colone to present the Last Chance Agreement. (Tr. 137). Without reading it, Mr. Colone refused to sign the Last Chance Agreement.[67] (Tr. 137-138). He knew the consequences of failing to do so. (Tr. 137-138). Therefore, by refusing to sign the Last Chance Agreement, Mr. Colone chose to be separated from his employment with Respondent.

Just like the discipline Mr. Colone received, Respondent did not present Mr. Colone with a Last Chance Agreement because he filed Grievances or engaged in any other protected activity. (Tr. 486-487). Respondent presented Mr. Colone with a Last Chance Agreement because of his total disregard of the Plant Rules and expected standards of conduct. (Tr. 487).

IV. LEGAL ARGUMENT

Counsel for the General Counsel bears the ultimate burden of proving every element of each claimed violation of the Act. *Des Moines Register & Tribune Co.*, 339 NLRB 1035 (2003). He failed to do so. Indeed, the record evidence overwhelmingly establishes that:

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[66] Mr. Dean also testified at the Hearing that he is not responsible for handing out hard hats. (Tr. 394-395). Going further, Mr. Dean testified that he never provided Mr. Granlee with a hard hat. (Tr. 395).

[67] This was the first time that an employee had refused to sign a Last Chance Agreement. (Tr. 316). Numerous other employees have signed a Last Chance Agreement, and continue to work for Respondent. (Tr. 316-317). For example, Mr. Griggs signed a Last Chance Agreement in 2013. (R-51).

- Mr. Mosley did not threaten Mr. Colone with termination (or any adverse employment action) at the grievance meeting on October 24, 2016;

- Respondent lawfully disciplined Mr. Colone on July 20, 2017, because of his unprotected and inappropriate behavior in and following a monthly safety meeting;

- Respondent lawfully terminated Mr. Colone because he progressed through all steps in the Discipline Policy and refused to enter into a Last Chance Agreement.

A. Mr. Colone's history of falsifying information and misrepresentations at the Hearing warrant any credibility finding to be made in Respondent's favor.

The allegations in the Consolidated Complaint fail because Mr. Colone's testimony should not be credited. His unsupported and, in some instances, outright manufactured testimony is simply insufficient to establish a violation of the Act. Key misrepresentations, inaccuracies, and baseless allegations in Mr. Colone's testimony are as follows:

- That his Grievance regarding the October 24, 2016 "threat" sat on Ms. Lord's desk for almost three months. (Tr. 84).

- Mr. Colone insisted that Mr. Dean jumping out of his seat at the July safety meeting, though no one else corroborated that allegation. (Tr. 92).

- Mr. Colone testified that the information in his Grievances generally comes from the individual making the complaint, though the evidence shows he did not speak to Mr. Zamora or Mr. Fobbs before filing a Grievance on their behalf. (Tr. 113).

- Mr. Colone disagreed with the testimony of Mr. Bailey, his own corroborating witness. (Tr. 116).

- Mr. Colone said that much of what Mr. Griggs said was untrue. (Tr. 120).

- Without any credible basis, Mr. Colone characterized two documents as falsified documents. (Tr. 149-150).

- Mr. Colone denied the LOU constituted a valid agreement, even though Mr. Wells and Mr. Johnston signed it. (Tr. 177-178).

- Mr. Colone called Mr. Wisenbaker a liar. (Tr. 180).

- Mr. Colone contended Mr. Griggs "changed his story three times and gave three different statements when he was questioned by the Company." (Tr. 180).

- Mr. Colone agreed that Mr. Griggs lied. (Tr. 181).

- Mr. Colone alleged that the Region found Mr. Mosley "at fault" with regard to Mr. Jones Charge. (Tr. 198-199).

- Mr. Colone denies he engaged in the misconduct that resulted in the first written warning, despite the Company's thorough investigation and the Region's finding that Respondent issued the discipline because of Mr. Colone's performance errors. (Tr. 220).

- Mr. Colone testified inaccurately about the disposition of his Charge regarding the first written warning. (Tr. 221).

- Mr. Colone denies he engaged in the misconduct that resulted in the second written warning, despite the Company's thorough investigation and the Region's finding that Respondent issued the discipline because of Mr. Colone's performance errors. (Tr. 228).

- Mr. Colone testified that his Charge regarding the first written warning and second written warning was dismissed because it was untimely. (Tr. 229-230).

It is also important to emphasize that this entire case is the result of Mr. Colone's repeated falsification of information, falsifications that the credible record evidence prove. Mr. Colone was also argumentative and evasive at the Hearing (in stark contrast with every other witness who provided testimony). Ultimately, Mr. Colone's testimony cannot be credited.

B. The General Counsel failed to carry his burden of proving that Mr. Mosley threatened Mr. Colone in Violation of Section 8(a)(1).

The General Counsel called a single witness to support the allegation that Mr. Mosley threatened Mr. Colone at the meeting on October 24, 2016: Mr. Colone. Mr. Colone provided the self-serving and uncorroborated testimony that Mr. Mosley threatened his job on October 24, 2016, by telling him "you ain't gonna make it." Even if Mr. Mosley made this statement, it does not constitute a violation of the Act.

First, Mr. Colone's testimony should not be credited over the testimony provided by Respondent's witnesses. As discussed above, during his employment with the Company and at the Hearing, Mr. Colone made numerous false and inaccurate statements. This alone should warrant a finding in Respondent's favor and a full dismissal of the Consolidated Complaint.

Second, the purported "threat" is hardly a threat. Mr. Colone does not contend that Mr. Mosley used express and direct terms to suggest an intent to cause him harm.[68] Telling someone "you ain't gonna make it" is not objectively threatening. In fact, Mr. Mosley testified under oath that he did not, in any way, mean to threaten Mr. Colone's employment. (Tr. 433). To the extent Mr. Mosley even made the statement at issue, he did so to convey his frustration that Mr. Colone was not working with him to make things better. (Tr. 433). Mr. Wisenbaker also denied the allegation that Mr. Mosley threatened Mr. Colone. (Tr. 477). Finally, and most critically, Mr. Griggs, the other hourly witness who was present for the meeting (whom the General Counsel notably declined to call as a witness), stated that he did not perceive Mr. Mosley's statement to constitute a threat.[69] (Tr. 366; R-32). The fact that three of the four individuals who heard the alleged comment testified that it was not threatening warrants a finding in Respondent's favor.

Third, an adverse inference should be drawn regarding the sworn statements in Mr. Griggs' Board Affidavit because the General Counsel failed to call Mr. Griggs, the only hourly corroborating witness, and failed to produce the Affidavit that Mr. Griggs supplied to the Region. *See e.g., Multi Color Industries, Inc.,* 317 N.L.R.B. 890 (1995) (citing *International Automated Machs., Inc*., 285 NLRB 1122, 1123 (1987) ("[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.")).

[68] At a best, Mr. Colone misinterpreted a statement that was not clearly communicated as a result of the heated discussion during in which it was made.

[69] Mr. Griggs was less confident on this answer at the Hearing, and he was visibly nervous. Notably, he did not testify that he believed Mr. Mosley threatened Mr. Colone at the meeting. He only suggested that, with the benefit of hindsight – since Mr. Colone had been discharged – maybe Mr. Colone was threatened. (Tr. 375).

The only logical conclusion that can be drawn from the General Counsel not calling Mr. Griggs to testify as a corroborating witness is that the General Counsel wanted to conceal Mr. Griggs' Board Affidavit from Respondent because it contains statements that do not support Mr. Colone's version of the events. Accordingly, the Administrative Law Judge should conclude that Mr. Griggs informed the Board that Mr. Mosley did not threaten Mr. Colone at the October 24, 2016 meeting.[70]

Ultimately, the credible record evidence warrants only one conclusion: that Mr. Mosley did not threaten Mr. Colone's employment.[71] Accordingly, this allegation should be dismissed.

C. The General Counsel failed to prove that Colone's union and/or protected concerted activity was a motivating factor in the Company's decision to discipline him.

The Consolidated Complaint contends that Respondent disciplined Mr. Colone because he raised questions in a monthly safety meeting on behalf of himself and other employees in his capacity as "Group Chairman" for the Union. The credible evidence presented at the Hearing demonstrates that this is false. Instead, that evidence proves that Respondent disciplined Mr. Colone because he was aggressive and hostile – berating both a member of management and a co-

[70] Respondent submits that the Administrative Law Judge erred when he sustained the General Counsel's objection to producing Mr. Griggs' Affidavit after the General Counsel specifically referred to the Affidavit during his cross-examination of Mr. Griggs. (Tr. 369-370). This allowed the General Counsel to hide the truth from the Administrative Law Judge at the Hearing. To resolve this error, Respondent respectfully submits the Administrative Law Judge should impose an adverse inference and conclude that the statements in Mr. Griggs' Affidavit favor Respondent. With that evidence (and the other credible record evidence), the Administrative Law Judge should conclude that Mr. Mosley did not threaten Mr. Colone in violation of Section 8(a)(1) of the Act.

[71] The fact that Mr. Colone was not discharged for more than eighteen months after this statement was purportedly made is further evidence that Mr. Mosley did not make a threat. Regardless, the General Counsel does not contend that the alleged threat is evidence of Respondent's discriminatory animus. Even if the General Counsel attempted to do so, Mr. Mosley was not involved in the decision to issue the verbal warning or present the Last Chance Agreement. (Tr. 438, 449-450).

employee, because he provoked a member of management after the meeting, and because he provided false information during Respondent's investigation into the meeting.

It is a well-settled proposition of law that Section 7 protects an employee's right to engage in Union activity and protected concerted activity. It is also a well-settled proposition of law that the Act does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. *See generally Peyton Packing Co., Inc.*, 49 NLRB 828 (1943). Indeed, Respondent's right to do so is memorialized in the Company's Agreement with the Union – an Agreement that Mr. Colone helped to negotiate and that he signed. (J-1). To find that Respondent's decision to issue Mr. Colone verbal discipline violated the Act in light of Mr. Colone's violation of Plant Rules at and following the safety meeting would totally eviscerate Respondent's Management Rights.

1. The General Counsel failed to establish a *prima facie* case.

In order to make out a *prima facie* case, the General Counsel was required to prove that Mr. Colone engaged in Union activity and Respondent disciplined him because of that Union activity, as alleged in the Complaint. The General Counsel failed to establish a *prima facie* case because Mr. Colone's actions were not protected by the Act (or they forfeited the protection of the Act) and because the verbal warning that Respondent issued was unrelated to Mr. Colone's purportedly protected activity. Indeed, the General Counsel only called a single corroborating witness – Mr. Jonathan Bailey – a witness Mr. Colone testified himself that he did not believe. (Tr. 116).

2. The conduct at issue was not protected.

As an initial matter, Respondent submits that Mr. Colone was not acting in any Union capacity at the meeting. No employees asked him to raise questions on their behalf, and he did not

volunteer to do so. (Tr. 90). Further, he was asking questions about the Company's potential liability, not questions about his or others' mutual aid or protection. Mr. Colone's actions cannot automatically constitute "union activity" simply because he also happens to be a Committeemen. *See Media General Operations, Inc.*, 346 NLRB 369 (2006).

Mr. Colone's conduct after the meeting was not protected either. Asking Mr. Dean to provide him with a copy of a new work-set standard (as opposed to asking substantive questions on the standard) is not for the mutual aid and benefit of the bargaining unit members that Mr. Colone purports to represent. It was for his own convenience, because he could have easily found that information online. Further, providing false information in connection with an investigation violated Company policy. It certainly cannot be labeled as Union activity or efforts intended for the mutual aid and benefit of others.

But, even if it is determined that Mr. Colone engaged in some sort of protected activity by raising questions about the Company's potential liability in the July safety meeting, the totality of his conduct in and after that meeting forfeited the protection of the Act.

The Board considers the following four factors when called upon to determine whether an employee's conduct became so egregious as to lose the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's conduct; and (4) whether the conduct was provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814 (1979). Here, the *Atlantic Steel* factors clearly demonstrate Mr. Colone's conduct lost the Act's protection.

a. The place of discussion weighs against protection.

First, the place of discussion weighs against protection. *See e.g., Atlantic Steel*; *see also Public Service Co. of New Mexico*, 364 NLRB 86 (2016); *Carrier Corp.*, 331 NLRB 11 (2000).

Mr. Colone's disruptive conduct constructively terminated the safety meeting that was held for the benefit of all employees. Although there was testimony that attendees were frustrated before Mr. Colone began to repeatedly ask questions about liability, it was not until after Mr. Colone became argumentative with Mr. Dean that employees tried to leave the meeting.

As to Mr. Colone's conduct after the meeting, he demanded information from Mr. Dean outside the presence of other employees. When he did not get it, he began to provoke and goad Mr. Dean. This one-on-one exchange, outside the presence of other bargaining unit employees, does not weigh in favor of protection.

Last, Mr. Colone provided inconsistent information in the investigation – information that other bargaining unit employees contradicted. This behavior is prohibited by the Company's Discipline policy, a policy with which Mr. Colone was familiar. It does not weigh in favor of protection.

b. The subject matter of discussion weighs against protection.

Second, the subject matter of discussion weighs against protection. *See e.g., Atlantic Steel*; *see also Public Service Co. of New Mexico; Carrier Corp.* The safety meeting was designed to discuss a specific topic and then afford employees the opportunity to ask safety-related questions. The purpose of the meeting was not to carry on a joint labor-management consultation, address a grievance, or engage in bargaining over the subject involved. Further, no high-ranking member of management or legal counsel – that is, a Company representative with authority or knowledge to definitively address the issues for which Mr. Colone demanded answers – was present. Mr. Colone's specific questions were better reserved for a Joint Resolution Committee meeting, if his goal was to obtain an actual answer (as opposed to just being disruptive). In fact, Mr. McCray testified that is exactly where Mr. Colone's questions should have been raised. (Tr. 345).

The subject matter of the discussion with Mr. Dean after the meeting also weighs against Mr. Colone. Demanding Mr. Dean provide him with documentation about a new work-set standard (and then goading Mr. Dean when he did not receive it) stands in stark contrast to asking Mr. Dean substantive questions about the new standard. This weighs against Mr. Colone.

Finally, when discussing the meeting during an interview that was part of Respondent's later investigation, Mr. Colone misrepresented facts and provided inconsistent information than the other rank-and-file employees who Respondent interviewed. This weighs against Mr. Colone.

c. Mr. Colone's conduct strongly weighs against protection.

Third, the nature of Mr. Colone's conduct strongly weighs against protection. *See e.g., Atlantic Steel*; *see also Public Service Co. of New Mexico; Carrier Corp.* As described in greater detail above, Mr. Colone attempted to provoke Mr. Dean, was aggressive in his repeated demands for answers, and created an intimidating environment. In fact, due to Mr. Colone's conduct, the meeting constructively adjourned before Mr. Dean concluded the meeting.

Mr. Colone's conduct was completely out of place given the situation. If Mr. Colone had been in a bargaining meeting, perhaps his conduct would have been justified. *See, e.g., Postal Service*, 268 NLRB 275 (1983) ("[I]n the administration and resolution of grievances under the collective-bargaining agreement, because of the nature of these endeavors, tempers of all parties flare and comments and accusations are made which would not be acceptable on the plant floor."). But, because it was in the presence of other employees at a general meeting, it was unacceptable.

To compound the inappropriate nature of Mr. Colone's conduct at the meeting, he also attacked a co-employee and then confronted Mr. Dean after the meeting. These actions are intolerable in a civil working environment.

Last, during the Company's subsequent interview, he provided false and inaccurate information. This conduct violated the Company's Plant Rules and its Discipline Policy. All of these facts weigh against protection.

d. Management did not provoke Mr. Colone, which weighs against protection.

Finally, there was no provocation by management, which weighs against protection. *See e.g., Atlantic Steel*; *see also Public Service Co. of New Mexico; Carrier Corp.* Although Mr. Dean became frustrated and could have handled Mr. Colone's demands in a different way, neither Mr. Dean nor the subject matter of the safety meeting provoked Mr. Colone to action. In fact, the General Counsel's only hourly corroborating witness testified that Mr. Dean was not unprofessional during the meeting. (Tr. 26-27).

Mr. Dean did not provoke Mr. Colone after the meeting. The opposite is true. The credible record evidence clearly establishes that Mr. Colone – a towering man compared to Mr. Dean – approached Mr. Dean and demanded a copy of the API standard. When Mr. Colone did not receive it, he attempted to incite Mr. Dean by asking him multiple times if he was mad. (Tr. 212).

In the post-meeting investigative interview, Mr. Colone yet again provided false information to management. Management had previously warned Mr. Colone of this behavior. (GC-2). Accordingly, it defies logic to suggest that Respondent provoked Mr. Colone to act the way that he did. If anything, Respondent attempted to provoke Mr. Colone to comply with Company policies and workplace standards. Mr. Colone consistently refused to do so.

In the end, Mr. Colone's conduct at and after the safety meeting was not protected by the Act. Accordingly, the Company did not commit an unfair labor practice by investigating that conduct or issuing discipline because of it.

3. There is no proof that Respondent harbored anti-Union animus.

Even assuming that the act of raising questions in a safety meeting constituted Union activity, the General Counsel still failed to prove that either Ms. Lord or Mr. Wisenbaker – the members of management who made the decision to issue discipline – had the requisite discriminatory animus.

The Board has traditionally considered the following factors when analyzing whether a decision-maker had animus towards an employee's union or protected concerted activity: (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, (4) the disparate treatment of the discriminatee, (5) departure from past practice, and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at p. 11 (2018) (citing *National Dance Institute—New Mexico, Inc*., 364 NLRB No. 35, slip op. at p. 10 (2016)). At best, the General Counsel can establish the first element. But, he cannot establish any other.

The General Counsel did not put on evidence of other unfair labor practices related to the safety meeting.[72] There are no statements or other evidence that establish that Respondent – via Ms. Lord or Mr. Wisenbaker (or their legal counsel, with whom they consulted) – had discriminatory animus toward the Union or Mr. Colone's Union activities. To the extent Mr. Colone was treated disparately, it is because he is the only employee who asked questions in the safety meeting and who was also disciplined. But, it is clear that Mr. Colone's conduct at and after the safety meeting differed starkly from the conduct of the other employees who asked questions. Moreover, the only other person who arguably acted unprofessionally at the safety meeting was

[72] Respondent submits this Brief demonstrates that the General Counsel failed to put on evidence of <u>any</u> unfair labor practice at the Hearing.

Mr. Dean, and he also received a verbal warning. Next, the General Counsel did not put on evidence of past practice. But, the record establishes that Mr. Dean regularly conducted safety meetings and Mr. Colone regularly raised questions in the safety meetings. To the extent issuing discipline to Mr. Colone constitutes a departure from a past practice, it is because his behavior at and after the safety meeting constituted a departure from his own past practices at these meetings. Finally, the General Counsel put on zero evidence that would even suggest that Respondent's explanation for its decision to issue the verbal warning is actually a pretext for discrimination.

Neither Mr. Wisenbaker nor Ms. Lord harbored discriminatory animus toward Mr. Colone because of his Union activity. The General Counsel failed to prove otherwise.

4. Mr. Colone would have been disciplined in the absence of Union activity.

Assuming that the General Counsel can establish a *prima facie* case, which Respondent denies, this allegation should still be dismissed because Mr. Colone would have been issued the discipline anyway. His attack of Mr. McCray, his misconduct after the meeting with Mr. Dean, and his misconduct during the investigation all violated Respondent's polices and expectations. Respondent validly issued discipline to Mr. Colone because of his behavior.[73]

D. The General Counsel failed to prove that Colone's union and/or protected concerted activity was a motivating factor in the Company's decision to discharge him.

The Region alleges that Respondent discharged Mr. Colone because he engaged in Union activities. The Board has promulgated a well-known test for determining causation (i.e., the basis for discharge in dual motivation cases alleging violation of the Act) in *Wright Line*, 251 NLRB 1083 (1980).[74]

[73] The fact no one besides Mr. Dean was disciplined compels the inference that Mr. Colone's conduct was different from the others who asked questions.

[74] In his opening statement, the General Counsel stated that this was not a *Wright Line* case. He vowed that he would put on evidence to establish that. He never did.

Under a *Wright Line* analysis, the General Counsel has the burden of proving that the employee's conduct was the motivating factor in the discharge. Initially, the General Counsel must come forward with sufficient evidence to establish a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." The General Counsel can establish a *prima facie* case by showing that (1) Mr. Colone was engaged in conduct protected by Section 7 of the Act; (2) that the employer had knowledge of the employee's protected conduct; and (3) union animus on the part of Respondent. *See Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007).

If the General Counsel can establish a *prima facie* case, the burden of proof shifts to the employer to prove that the adverse action taken with regard to the employee's terms and conditions or tenure of employment would have been taken regardless of the fact that the employee engaged in conduct protected by the Act.

Wright Line is "inherently a causation test" and, consequently, "[t]he ultimate inquiry is whether there is a nexus between the employee's protected activity and the challenged adverse employment action." *Kitsap,* 366 NLRB No. 98, at p. 11-12, n. 25 (citation omitted) (2018).[75]

1. The General Counsel failed to establish a *prima facie* case.

The General Counsel failed to establish a *prima facie* case because Mr. Colone lost the protection of the Act and because Respondent does not harbor any anti-Union animus. Instead, he oversimplified what actually transpired and asks the Administrative Law Judge to find that

[75]Because *Wright Line* is "inherently a causation test," "[n]ot just any evidence of animus against protected activity generally will necessarily satisfy the initial *Wright Line* burden of proving unlawful motivation for the particular adverse employment action at issue." Id. (citing *Roadway Express, Inc.*, 347 NLRB 1419, 1419 fn. 2 (2006) (finding that, although there was some evidence of animus in the record, it was insufficient to sustain the General Counsel's initial *Wright Line* burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418-419 (2004) (finding insufficient facts to show that the respondent's animus against the employee's union activity was a motivating factor in the decision not to recall him), enf'd. 156 Fed. App'x. 330 (D.C. Cir. 2005))).

Respondent violated the Act. But, even if Mr. Colone engaged in protected activity, the General Counsel does put on evidence that those involved in the decision to present the Last Chance Agreement (i.e., Ms. Lord, Mr. Wisenbaker, Ms. Sharp and Respondent's legal counsel) harbored any discriminatory animus.

2. The conduct at issue was not protected, and to the extent that it was, it did not unlawfully motivate Respondent's decision to present Mr. Colone with a Last Chance Agreement.

The Consolidated Complaint contends that Respondent discharged Mr. Colone because of eight specific incidents of allegedly protected Union activity. It fails to acknowledge Mr. Colone's misconduct in association with that activity, however, which caused Mr. Colone to lose the protection of the Act. But, even if certain acts were protected, they did not unlawfully motivate Respondent's decision to present Mr. Colone with a Last Chance Agreement.

First, the Consolidated Complaint contends that the Grievance Mr. Colone filed on March 22, 2017, motivated Respondent's decision to discharge Mr. Colone.[76] This is false. Mr. Colone admits that he submitted false information in connection with this Grievance and that he never even spoke to the grievants on whose behalf he filed the Grievance. Mr. Colone withdrew the Grievance before Respondent could determine whether to issue discipline. But, Respondent wanted to ensure that Mr. Colone did not engage in this type of misconduct again. Therefore, to caution about the potential consequences of his actions, Respondent sent Mr. Colone a letter on April 3, 2017 encouraging Mr. Colone to comply with Plant Rules. (GC-2). This letter did not constitute formal discipline. It was simply intended to deter future misconduct. It proved ineffective.

[76] The timing between this alleged protected activity and Mr. Colone's separation from employment weighs against a finding that the two were connected in any way.

Second, the Consolidated Complaint contends that the Grievance Mr. Colone filed on March 23, 2017 (i.e., Grievance 3-2017), motivated Respondent's decision to discharge Mr. Colone.[77] This is false. This Grievance resolved at Step 2 in a mutually satisfactory way.[78] (GC-5). It defies logic that this Grievance, which Mr. Colone submitted more than a year before he was presented with a Last Chance Agreement, motivated Respondent's decision to discharge him. This is particularly true since the General Counsel does not allege that the ten other Grievances that Mr. Colone filed during the relevant time period had anything to do with Mr. Colone's termination.

Third, the Consolidated Complaint contends that the statement Mr. Colone submitted in support of the March 23, 2017 Grievance motivated Respondent's decision to discharge Mr. Colone. This is false. Not only is it illogical that this statement motivated Respondent's decision when there is no evidence that the underlying Grievance motivated Respondent's decision, but the Administrative Law Judge cannot even evaluate the possibly probative value of the statement because the General Counsel never entered it into evidence.

Fourth, the Consolidated Complaint contends the questions Mr. Colone raised in the safety meeting motivated Respondent's decision to discharge Mr. Colone. This is false, as Respondent explains above with regard to the verbal warning that it issued to Mr. Colone.

Fifth, the Consolidated Complaint contends the Grievance that Mr. Colone filed on November 15, 2017 (i.e., Grievance 14-2017) motivated Respondent's decision to discharge Mr. Colone. This is false. Mr. Colone submitted false information in connection with this Grievance which caused him to lose the protection of the Act. While Mr. Colone's misconduct in connection

[77] The timing between this alleged protected activity and Mr. Colone's separation from employment weighs against a finding that the two were connected in any way.

[78] The only unsatisfactory aspect of this Grievance was Mr. Colone's disrespectful behavior toward Mr. Mosley during the processing. (GC-2).

with this Grievance motivated Respondent's decision to present him with a Last Chance Agreement, it was not the simple act of filing a Grievance. Instead, this Grievance is part and parcel of the Last Chance Agreement because Mr. Colone yet again submitted false information to Respondent.

Sixth, the Consolidated Complaint contends the Grievance that Mr. Colone filed on February 15, 2018 (i.e., Grievance 1-2018) motivated Respondent's decision to discharge Mr. Colone. This is false. When Ms. Lord's investigation did not initially corroborate the Grievance's allegations, Mr. Colone expressly stated Mr. Burton told him that Mr. Watson cursed at Mr. Butler and pointed in his face. Ms. Lord asked Mr. Burton directly whether he had provided that information to Mr. Colone (Mr. Burton had already established that he did not witness such an incident). He flatly denied doing so. (Tr. 302-304; R-38).

Seventh and eighth, the Consolidated Complaint contends the Grievances that Mr. Colone filed on March 23, 2018 (i.e., Grievances 2-2018 and Grievance 4-2018) and the related statement motivated Respondent's decision to discharge Mr. Colone. This is false. In connection with those Grievances, Mr. Colone provided a statement. His statement represented (or at the very least implied) that he had personal knowledge regarding certain allegations concerning Ms. Benoit and Mr. Dean. Ms. Lord's investigation revealed that yet again, Mr. Colone provided false information.

A Union official is protected under the Act while fulfilling his role in processing Grievances unless he exceeds the bounds of the Agreement in a manner that is extraordinary, obnoxious, wholly unjustified, and that represents a departure from the *res gestae* of the Grievance procedure. *See In re Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976).

Mr. Colone's unrelenting falsification of information in relation to Grievances plainly exceeds the Agreement. The fact that Mr. Colone insisted on providing false information again

and again despite Respondent's pleas that he cease from that misconduct cannot be justified. His behavior constitutes an extraordinary departure from the clear terms of the Grievance procedure. While Mr. Colone's activity may have afforded him some protection at one point, Mr. Colone forfeited that protection by obnoxiously and repeatedly violating Respondent's Plant Rules.

3. There is no proof that Respondent harbored anti-Union animus.

Even assuming the activities identified in the Consolidated Complaint constituted protected concerted activity, the Counsel for the General Counsel still failed to prove that either Ms. Lord or Mr. Wisenbaker – or anyone else involved in the events giving rise to Mr. Colone's discharge, such as Respondent's legal counsel – had the requisite animus toward that activity to satisfy *Wright Line*.

Again, the Board looks to six factors when analyzing whether a decision-maker had animus towards an employee's union or protected concerted activity: (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, (4) the disparate treatment of the discriminatee, (5) departure from past practice, and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. *Kitsap*, 366 NLRB No. 98, at p. 11 (citing *National Dance Institute*, 364 NLRB No. 35, at p. 10). None of these factors weighs in favor of finding animus towards Mr. Colone's union and/or protected concerted activity.

Only a few of the activities are proximal to Respondent's decision to present Mr. Colone with a Last Chance Agreement. The General Counsel has provided no proof of <u>any</u> unfair labor practice. There are <u>no</u> statements or actions that demonstrate that Respondent had discriminatory animus. Mr. Colone was not treated disparately. There is no evidence that others engaged in the same, repeated violations of Company policy as Mr. Colone but were not disciplined or discharged.

There is no evidence that Respondent deviated from past practice.[79] Finally, the General Counsel – through his paltry evidence – did not establish that Respondent's explanation for presenting the Last Chance Agreement to Mr. Colone was a pretext for discrimination.

4. Mr. Colone would have been discharged in the absence of Union activity.

Assuming the General Counsel can establish a *prima facie* case, which Respondent denies, this allegation should still be dismissed because Mr. Colone would have been discharged even in the absence of Union activity. Respondent terminated Mr. Colone because he refused to sign a Last Chance Agreement that the General Counsel does not challenge. Respondent presented Mr. Colone with that Last Chance Agreement because of his persistence in providing false information in violation of Company policy.

Respondent conducted several objective and fair investigations, interviewed numerous rank-and-file employees in connection with those investigations, and made all decisions at issue after careful consideration and in consultation with legal counsel. The credible record evidence establishes that Respondent had sufficient justification to believe that Mr. Colone repeatedly falsified information. Therefore, the credible record evidence establishes that Respondent had sufficient justification to present the Last Chance Agreement. When Mr. Colone chose not to continue his employment by signing the Last Chance Agreement, Respondent had sufficient justification to discharge him. Even Mr. Colone admits that Respondent went through all of the steps in the Discipline Policy. (Tr. 136).

[79] At best, Respondent departed from past practice to the extent it allowed him to get away with these policy violations in the past.

The General Counsel failed to make the required initial showing under *Wright Line*. But, even if the General Counsel had met his burden, Respondent proved that it would have taken the same action notwithstanding Mr. Colone's alleged union or protected concerted activity

V. CONCLUSION

Respondent discharged Mr. Colone because he refused to sign a Last Chance Agreement, which Respondent presented to him in a final attempt to correct Mr. Colone's pattern and practice of disrespecting supervisors and submitting falsified information. At no point did Respondent discriminate against Mr. Colone because of his Union activity. At no point did any member of Respondent's management team threaten Mr. Colone's employment.

The General Counsel failed to carry his burden of establishing that Respondent violated Sections 8(a)(1) and (3) of the Act, as alleged in the Consolidated Complaint. The preponderance of the credible record evidence establishes that Respondent did not violate the Act. For these reasons, and those stated above, Respondent requests dismissal of the Consolidated Complaint and all allegations of unlawful conduct made therein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

LION ELASTOMERS	)	
	)	
and	)	**Case Nos: 16-CA-190681**
	)	**16-CA-203509**
UNITED STEEL, PAPER AND FORESTRY,	)	**16-CA-225153**
RUBBER, MANUFACTURING, ENERGY,	)	
ALLIED INDUSTRIAL AND SERVICE	)	
WORKERS INTERNATIONAL UNION,	)	
LOCAL 228	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2019, I e-filed the foregoing using the Board's e-filing system and immediately thereafter served it by electronic mail upon the following:

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